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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 463

LYDON WEBBER, JOHN MARTINSON, JOHN P. MURPHY, JOSEPH O'DONNELL, JULIO F. PACHECO, J. DAMSTEDT, JOSEPH NESS-MAR, K. VLACHOS, ROBERT C. MISCIONE, SOREN LASSEN, EDWARD MARSH, RICHARD THOMPSON, GRADY WATSON, GERALD E. PETTIPAS, MARVIN PHILLIPS, JOHN BOLING, ZYGMUNT W. OSINSKI; RUSSELL H. BRANDON, MAX HARRISON, JAMES HAYES, AL KERR, ROBERT MATTHEWS, and LINDSEY J. WILLIAMS, as Trustees of the Seafarers Welfare Plan, and RUSSELL H. BRANDON, MAX HARRISON, JAMES HAYES, AL KERR, E. B. McAULEY and AL TANNER, as Trustees of the Seafarers Vacation Plan; JOSEPH P. GLYNN, ANDREW MacDONALD, KENNETH J. WRIGHT, RALPH E. CASEY, WILLIAM G. MULLINS, JOSEPH S. KISS, W. H. MILLS, C. J. BRACCO and JAMES TIERNEY, as Trustees of the Radio Officers Union Pension and Welfare Plan; JOSEPH P. GLYNN, ANDREW MacDONALD, WILLIAM G. MULLINS, JOSEPH S. KISS and W. H. MILLS, as Trustees of the Radio Officers Union Vacation Plan; ROBERT C. FRAVEL, AHMED MEHSSIN; and MAX HARRISON and PRICE C. SPIVEY, as Trustees of the Maritime Advancement Programs,

Petitioners,

against

TURNER & BLANCHARD, INC.,

Respondents,

and

S.S. EMILIA and A. H. BULL STEAMSHIP CO.

BRIEF FOR RESPONDENT TURNER & BLANCHARD, INC.

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Question Presented

Is the cost of discharging the cargo of an attached vessel a marshal's expense?

Statement

The *Emilia* was arrested in mid-December, 1962 while she was berthed at Pier 21, Brooklyn, in a terminal operated by Turner & Blanchard, Inc. On March 20, 1963, about three months after her arrest, three owners of more than 60% of the cargo on board filed libels to repossess their cargo. They then joined in a motion in the District Court for summary relief, directing the Marshal, at his own expense, to discharge their cargo and deliver it to each of them free of cost. Turner & Blanchard, Inc. did not oppose removal of cargo by the owners but through affidavit of its President opposed any order which would have made the cost of discharging the cargo a Marshal's expense.

The United States of America, as one of the intervening libelants, appeared by its local attorney in charge of the Admiralty & Shipping Section of the Department of Justice and submitted an affidavit in support of the motion, relating that a quantity of government cargo consisting of chill and freezer cargo, known in the trade as reefer cargo, was on board and if not removed could become a total loss, but that to preserve it maintenance men had been retained and "this cost money"; that other government cargo on board, identified as some 2500 bags of wheat, if confined in the hold of the vessel for any protracted period of time might also deteriorate.

The second intervening libelant, Caltex (India) Limited explained by affidavit that it had 1070 tons of tinplate which had been stowed in the lower holds of the vessel, while the third intervening libelant, the Government of Pakistan averred that it had eight locomotives on deck and other cargo below having an approximate value of 2½ million dollars.

Their motion came on to be heard before Judge George Rosling who reserved decision. After he announced that,

he was not prepared to rule upon the motion until a later date, the United States Government insisted on judicial permission to remove its cargo. Permission was granted but the Government for some undisclosed reason, changed its plan and refused to do so.

The cargo interests then decided to play a waiting game. They took no further steps to reclaim their cargo until after a motion was made before Judge Mishler on behalf of Turner & Blanchard, Inc. on April 26, 1963, for an order directing the removal of the *Emilia* from Pier 21 where she was then berthed, or that she be sold, because (a) wharfage which has priority as an administrative expense was eating up any proceeds that might be realized from the sale of the vessel, and (b) because Turner & Blanchard, Inc. was suffering irreparable financial damage in loss of stevedoring business from the presence of the *Emilia* fully loaded at Pier 21 (3a, 8a).*

ARGUMENT

POINT I

The decision below was based on *New York Dock Co. v. S.S. Poznan*, 274 U. S. 117, but this reliance was misplaced because the order under review is not supported by *Poznan*, in which this Court never reached the question now presented.

The parties in this case agree that the cost of preserving the ship in *custodia legis* is preferred over maritime liens, but they are not in accord over the rule of law established below that cargo owners may have their cargo removed as a cost of preserving the ship.

The cargo interests saw in the motion before Judge Mishler an opportunity to achieve by indirection the same

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* Unless otherwise explained numerals in parentheses refer to the pages of the appendix to the petition for certiorari.

relief which they had sought but not attained by direct application to Judge Rosling. After Judge Mishler indicated that he would go along with the cargo owners' claim that the cargo should be removed at the cost of the vessel, the cargo owners withdrew their earlier motion before Judge Rosling.

Before Judge Mishler all three possessory libelants claimed that they could not remove their cargo except as part of a complete discharge operation. Imaginary, speculative difficulties were projected over the problems attending the removal of the cargo, none of which were supported by any evidence; none of which would have been of any significance if an order had been entered either directing the owners to remove cargo or deeming it abandoned and sold or removed at the expense of reluctant cargo owners.

On the question submitted by the petitioner for certiorari, the United States of America is in no better position than other civil litigant contract claimant in an Admiralty suit. So far by its presence in this case, pushing the contention that its cargo aboard might deteriorate, simultaneously refusing to take it off except on its own terms, it has imparted to the cause a sense of urgency and special need which although no more than a ghost issue has nevertheless been very impressive to the District Judge and the Court of Appeals, both of whom expressed concern over what would happen to the wheat on board if it were not promptly removed. The Government of Pakistan and Caltex simply rode along on the Government's coat-tails.

The Record on Appeal in *Poznan* discloses that the case was considered by this Court on an agreed statement of facts. The claims

> ". . . consisted of . . . suits for nondelivery of cargo shipped from New York and carried by the ship to Havana and back to New York without being discharged until the ship returned and unloaded the cargo in New York. This action was against the ship in rem

and against the Acme Operating Corporation, charterer of the ship, and the Polish-American Navigation Corporation, the owner of the ship in personam and an interlocutory decree entered against all three. The ship has now been sold and there is now about two hundred and forty odd thousand dollars left in the Registry of the Court, being the proceeds of the sale. The libels in the consolidated cause claim damage in the amount of about $1,700,000. and their actual provable damage will exceed the amount of money left in the Registry of the Court." (Stipulation, *Poznan*, R. 10)

On November 30, 1920 the New York Dock Co., as owner of a pier on the Brooklyn shore of the East River, made a contract with a navigation company owning the *S.S. Poznan* for the use of the pier by their vessel at a stipulated rate (R. 8-9).*. On December 2, 1920 the *Poznan* arrived and was made fast to the pier. Thereafter, at the instance of certain libelants, whose libels were for the recovery of the vessel's cargo and for damages for breach of contracts of affreightment, the vessel was arrested by the Marshall who allowed her to remain fast to the pier (R. 9).

Later the District Court ordered delivery of a certain part of the cargo to one libelant and made the same order applicable to all libelants claiming parts of the cargo (R. 9, 14).

Before the cargo was fully discharged on the pier, the charterer of the vessel applied to the District Court for leave to have the vessel moved to another pier. This motion was opposed and denied (R. 30). The cargo was then completely discharged from the vessel by February 18, 1921. Delivery of the cargo from the pier was completed

* Numerals preceded by "R" refer to the Record on appeal in *Poznan*.

March 1, 1921, but the vessel remained fast to the pier until and including March 11, 1921 when it was moved to another pier (R. 9). The Marshal refused to pay the Dock company's bill for wharfage without an order of the Court (R. 11-13) and the Dock company on April 9, 1921 filed its libel (R. 1, 3).

Essentially, the foregoing facts as stipulated, were found by a Special Commissioner whose findings were confirmed by the District Court and accepted by the Circuit Court of Appeals. These findings presented for consideration by this Court only the question of law whether wharfage was a marshal's cost which could be recovered by the wharfinger regardless of whether a lien could be filed against a vessel in *custodia legis*.

POINT II

The opinions below have destroyed traditional priorities by improperly engrafting on *Poznan* a principle which that case did not establish.

In *Poznan*, this Court wrote that:

> "Service rendered to the ship after arrest, in aid of the discharge of cargo, and afterward pending the sale, necessarily inured to their benefit, [that is to the cargo owner's benefit for they were the only libelants in the case] for it contributed to the creation of the fund now available to them. The most elementary notion of justice would seem to require that services or property furnished upon the authority of the court or its officer, acting within his authority, for the common benefit of those interested in a fund administered by the court, should be paid from the fund as an 'expense of justice'. The Phebe, Ware, 354, 359, Fed. Cas. No. 11,065."

By these words this Court established two copulative requirements: (1) "Service rendered to the ship after arrest, in aid of discharge of cargo, and afterward pending the sale", (2) "for the common benefit of those interested in a fund administered by the court".

As To (1)

Before a cargo owner can remove cargo the ship has to be in a place where it can be discharged. If she is lodged at a dock while in *custodia legis* then the cargo can be removed. In *Poznan* this Court in using the words "in aid of the discharge of cargo" was merely referring to a circumstance. There was no claim there that the cargo should be discharged as a Marshal's expense; no issue and no decision on that point. Indeed each of the cargo owners had already removed his cargo at his own expense. Hence the order under review which is purportedly based on *Poznan* engrafts on this Court's decision a new principle which was not part of the subject of that case.

As To (2)

Generally speaking, a ship owner's failure to discharge cargo amounts to a breach of contract with cargo owners for which they have a claim which falls into Class IV in the scheme of priorities, but by their maneuvers the cargo interests have so far succeeded in elevating themselves to top priority, even above the claim for wharfage, which everyone concedes to be a Marshal's expense. By obtaining an order directing that the discharging expenses be paid first, the United States Government has destroyed traditional priorities in this area of the law and has even established a new system of priority among items, all of which are concededly in the class of Marshal's expenses.

By deliberately refusing to repossess their cargo, until they could do so on their own terms, the owners have done nothing in aid of the vessel or for the common benefit of the lienors. To the contrary, their actions were definitely detrimental to the common interests of the lienors because if they had removed the cargo in which they alone had interests, as they should have, charges for wharfage and other expenses of sale would have been kept at a minimum, and the vessel might well have brought a higher price in a sale before it earned a reputation as one in distress; in dire need of a purchaser to bail out the cargo interests.

Instead of directing the cargo interests to remove their cargo as he should have, the District Judge protected the cargo interests at the expense of the prior lienors and not in their aid. His order was made *ad hoc*. It represents a departure from settled principles and from a system of established priorities on which people have relied. Definite rules of priority are essential so that parties may at least know their rights in advance of decision. Existing laws providing for such rights have been ignored, and unless the order is reviewed here, the practice which it purports to authorize will make a shambles of the law of priorities and work an injustice to the preferred lienors in this case.

CONCLUSION

Certiorari should be granted so that the orders below may be modified to the extent indicated by the petition.

Respectfully submitted,

JULIUS L. GOLDSTEIN,
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Certification of Service.

This is to certify that on the 19th day of September, 1963 I served true and correct copies of the foregoing brief by first class mail upon counsel for the respective parties hereto, as follows:

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